IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI

Supreme Court No. 84659

STATE OF MISSOURI EX REL.,
KATHLEEN DIEHL,

Relator,

vs.

THE HONORABLE JOHN R. O'MALLEY,
Judge, Division 6, Circuit Court of Jackson County, Missouri,

Respondent.

BRIEF AMICUS CURIAE OF THE ST. LOUIS CHAPTER OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RELATOR DIEHL

John D. Lynn, #30064
Attorney for Amicus Curiae St. Louis Chapter of the National Employment Lawyers Association
393 N. Euclid Ave., Suite 220
St. Louis, MO 63108
(314) 367-5575
(314) 454-1911 (Fax)

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Case: **Page:**

JURISDICTIONAL STATEMENT

This is a proceeding for a writ of prohibition in which the Relator is Plaintiff Kathleen Diehl and the Respondent is the Honorable John R. O'Malley, Judge of the Circuit Court of Jackson County. The underlying lawsuit involves claims of employment discrimination under the Missouri Human Rights Act (MHRA). The issue is whether Judge O'Malley exceeded his jurisdiction in denying Ms. Diehl a jury trial on her claims against Defendant NASD Regulation, Inc. This Court has jurisdiction pursuant to Section 4 of Article V of the Missouri Constitution.

STATEMENT OF INTEREST

Amicus Curiae St. Louis Chapter of the National Employment Lawyers Association is a voluntary membership organization of approximately 45 lawyers who represent employees in labor, employment and civil rights disputes in the St. Louis area. It is an affiliate of the National Employment Lawyers Association (NELA) which consists of over 3,500 attorneys who specialize in representing individuals in controversies arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous amicus curiae briefs in state and federal courts across the country regarding the proper interpretation and application of employment discrimination laws to ensure that such laws are fully enforced and that the rights of workers are fully protected. Members of the St. Louis Chapter of NELA regularly represent victims of discrimination in cases brought under the MHRA.

STATEMENT OF FACTS

Plaintiff Diehl brought this lawsuit alleging, among other things, that her employer, Defendant NASD Regulation, Inc., treated her adversely on account of her age, 54, in the terms and conditions of her employment, ultimately forcing her to leave her job after over six years of satisfactory service with Defendant. Her petition alleged violations of the MHRA and sought monetary relief in the form of back pay, emotional distress damages, punitive damages and attorneys' fees.

After commencing her lawsuit, Ms. Diehl filed a motion for a jury trial on her claims under the MHRA. Respondent Judge O'Malley, in a one-page Order, denied the motion based on a decision by the Eastern District Court of Appeals, which in turn relied on a decision by the Southern District Court of Appeals in **State ex rel. Tolbert v. Sweeney**, 828 S.W.2d 929 (Mo. App. 1992), that there is no constitutional right to trial by jury in civil actions brought in Circuit Court seeking money damages under the MHRA. Judge O'Malley did not cite or discuss the more recent decision by the Western District Court of Appeals in **State ex rel. Wayside Waifs v. Williamson**, 3 S.W.3d 390 (Mo. App. 1999). There, the Court pointedly refused to endorse the reasoning and result in **Tolbert**, leaving open the question whether the Missouri Constitution mandates jury trials under the MHRA. 3 S.W.3d at 395.

On August 27, 2002, this Court entered a Preliminary Writ of Prohibition. Amicus Curiae urges that it now be made permanent.

POINT RELIED ON

RELATOR DIEHL IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TRYING HER CASE WITHOUT A JURY BECAUSE THE MISSOURI CONSTITUTION GUARANTEES HER A

JURY TRIAL ON HER CLAIMS UNDER THE MHRA IN THAT THEY ARE ANALOGOUS TO A TORT ACTION FOR PERSONAL INJURY AND SEEK ONLY MONETARY DAMAGES

Bates v. Comstock Realty Co.

267 S.W. 641 (Mo. 1924)

Briggs v. St. Louis & San Francisco Railway Co.

20 S.W. 32 (Mo. 1892)

Rice v. Lucas

560 S.W.2d 850 (Mo. banc 1978)

Slagle v. Calloway

64 S.W.2d 923 (Mo. 1933)

ARGUMENT

RELATOR DIEHL IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TRYING HER CASE WITHOUT A JURY BECAUSE THE MISSOURI CONSTITUTION GUARANTEES HER A JURY TRIAL ON HER CLAIMS UNDER THE MHRA IN THAT THEY ARE ANALOGOUS TO A TORT ACTION FOR PERSONAL INJURY AND SEEK ONLY MONETARY DAMAGES

Article I Section 22(a) of the Missouri Constitution states that "the right of trial by jury as heretofore enjoyed shall remain inviolate." This constitutional provision safeguards the right to trial by jury in actions at law but not in actions at equity. **State ex rel. Willman v. Sloan**, 574 S.W.2d 421, 422 (Mo. banc 1978). To determine whether a particular action is at law or at equity, this Court has looked to (1) the nature of the cause of action asserted and (2) the nature of the remedy sought, the latter being more important. **Hammons v. Ehney**, 924 S.W.2d 843, 846 (Mo. banc 1996). Analysis of these two factors in this case shows that Plainfiff Diehl has a clear constitutional right to trial by jury on her claims of employment discrimination under the Missouri Human Rights Act (MHRA).[1]

[1]The standard of appellate review is whether Respondent drew the correct legal conclusions concerning Ms. Diehl's entitlement to a jury trial under the Missouri Constitution.

1. Nature of the Cause of Action Asserted

The Missouri Constitution protects the right to trial by jury as it existed when the Constitution was first adopted in 1820. **Hammons**, 924 S.W.2d at 846. It is important to understand, however, that the plaintiff is not required to show that the cause of action she is asserting had an exact equivalent in early nineteenth-century jurisprudence. Rather, this Court has held that the key question is whether the asserted cause of action is "analogous" to or of "like nature" to a cause of action which would have been tried to a jury in 1820:

> It is argued by respondent that as actions on special tax bills were unknown at common law there is no common law right of trial by jury preserved inviolate by section 28, art. 2, of the Constitution. The construction of that provision as implied in the argument is, we think, too narrow. The right of trial by jury as it existed at common law may well include the right to such a trial not only in common law action, so called, but those of like nature in which that mode of trial is appropriate. . . The question then resolves itself into whether the proceeding for the collection of special tax bills is analogous to an action at common law, or whether it is in the nature of a suit in equity.

Bates v. Comstock Realty Co., 267 S.W. 641, 644 (Mo. 1924). Such a flexible as opposed to a rigid historical analysis achieves a sensible balance between, on the one hand, honoring the text of the Missouri Constitution and, on the other, ensuring its continuing vitality in modern times. See generally **City of Monterey v. Del Monte Dunes,** 119 S.Ct. 1624, 1638 (1999).

Actions under the MHRA to redress unlawful discrimination are closely analogous to actions in tort to redress personal injuries. The MHRA is based on the recognition of the right of each person to be free from the insult of intentional discrimination. The statute recognizes this important right and through an award of actual damages, including compensation for emotional distress, seeks to make the victim whole for injuries caused by the discrimination. **H.S. v. Board of Regents**, 967 S.W.2d 665, 673 (Mo. App. 1998); **Pollock v. Wetterau**, 11 S.W.3d 754, 769, 771 (Mo. App. 1999). Courts in other jurisdictions have analogized statutory claims of discrimination to common law torts. The U.S. Supreme Court has set the tone:

> A damage action under the statute [the Fair Housing Act of 1968] sounds basically in tort -- the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. . . . [T]his cause of action is analogous to a number of tort actions recognized at common law.

Curtis v. Loether, 415 U.S. 189, 195 (1974). Many other courts have echoed the Supreme Court's reasoning:

> [M]oney damages for sex discrimination [under the West Virginia Human Rights Act] sounds in tort. That is, sex discrimination is an injury to the health, welfare, and dignity of the victim. Because her claim is a species of personal injury akin to tort, the plaintiff in a sex discrimination case has the right to try to a jury her factual claims that would entitle her to money damages for personal injury.

Perilli v. Bd. of Educ. Monongalia City, 387 S.E.2d 315, 317 (W. Va. 1989); see also **Fud's, Inc. v. State**, 727 A.2d 692, 697 (R.I. 1999); **Gallagher v. Wilton Enterprises**, 962 F.2d 120, 122-123 (1st Cir. 1992); **Dalis v. Buyer Advertising**, 636 N.E.2d 212, 215 (Mass. 1994).

A Missouri appellate court has recently held that MHRA claims sound in tort for purposes of state sovereign immunity, see **Keeney v. Missouri Highway and Transp.,** 70 S.W.3d 597, 600 (Mo. App. 2002) (immunity has been waived, however, by the state legislature), and this Court should likewise hold that MHRA claims sound in tort for purposes of the constitutional right to trial by jury. A tort action for personal injury is, of course, the classic example of an action at law for which the right to trial by jury existed in 1820. **Hostler v. Holland Furnace Co.,** 327 S.W.2d 532, 534 (Mo. App. 1959); 50 C.J.S. Juries §19 (1947). Consequently, the cause of action asserted by Ms. Diehl under the MHRA must be characterized as legal rather than equitable in nature.

Against this conclusion, the Southern District in **Tolbert** ruled that claims which did not exist at the time the Missouri Constitution was adopted, including statutory claims under the MHRA, do not come within the constitutional guarantee of the right to trial by jury. **State ex rel. Tolbert v. Sweeney,** 828 S.W.2d 929, 933 (Mo. App. 1992). The Court's ruling cannot survive critical scrutiny, however, for several reasons.[2]

[2]It is well-settled that the constitutional right to trial by jury extends to statutory as well as common

law causes of action. **Briggs v. St. Louis & San Francisco Railway Co.,** 20 S.W. 32, 33 (Mo. 1892).

Most importantly, it overlooks this Court's holding in **Bates** that the relevant inquiry under the Missouri Constitution is whether the asserted claim is "analogous" to or of "like nature" to a claim which was triable to a jury in 1820. This is a critically important inquiry which the Court in **Tolbert** conspicuously neglected to undertake. Additionally, the Court overlooked the paradoxical consequences of its ruling. It would mean, for example, that product liability claims, which have always been tried to juries in Missouri, could no longer be tried to juries because such claims did not exist in 1820. It would also mean that a multitude of statutory claims which have always been tried to juries in Missouri would have to be tried before judges because they did not come into existence until after 1820. These include the Missouri wrongful death statute, Section 537.080 et seq., R.S.Mo. 2000, the Missouri service letter statute, Section 290.140, R.S.Mo. 2000, the Missouri Omnibus Nursing Home Act, Section 198.093 R.S.Mo. 2000, and the Missouri statute forbidding retaliation against employees who exercise rights under the workers' compensation law, Section 287.780, R.S.Mo 2000. Nothing in **Tolbert** can compete with the sheer unlikelihood that the Missouri Constitution can be interpreted to create such outlandish consequences.

Another problem with **Tolbert** is that the Court did not cite any pertinent caselaw in support of its ruling. To be sure, it relied on this Court's decision in **DeMay v. Liberty Foundry Co.**, 37 S.W.2d 640 (Mo. 1931) and the Eastern District's decision in **State ex rel. Missouri Com'n v. Lasky**, 622 S.W.2d 762 (Mo. App. 1981). But nothing in these two cases suggests that they meant to depart from the rule adopted by this Court in **Bates** that the constitutional right to trial by jury extends not only to claims which were tried to a jury in 1820 but also to "analogous" claims which were tried to a jury at that time. Indeed, **DeMay** antedates **Bates** and is strictly controlled by it.

The decisions in **DeMay** and **Lasky** must be viewed as turning on a different axis. They both

arose in the special context of administrative proceedings or, what amounts to the same thing, judicial review of administrative proceedings. Historically, there has never been a constitutional right to trial by jury in such proceedings for two reasons.

First, jury trials would be utterly incompatible with the whole concept of administrative adjudication. **Curtis,** 415 U.S. at 194. Second, the constitutional guarantee of trial by jury applies only to actions brought in courts, such as Circuit Courts, which proceed "according to the course of the common law" and not to actions brought in special courts such as Probate Courts, Juvenile Courts or Magistrate Courts, which do not proceed "according to the course of the common law." **Rice v. Lucas**, 560 S.W.2d 850, 857 (Mo. banc 1978). An administrative agency is not, of course, a court which proceeds according to the course of the common law. Nor is the Circuit Court when it reviews the agency's decision because its review is sharply circumscribed by the special provisions of the Missouri Administrative Procedure Act. **Kansas City v. Missouri Com'n**, 632 S.W.2d 488, 490 (Mo. banc 1982). By contrast, a private civil action in Circuit Court for money damages under the MHRA has all the attributes of traditional common law litigation including a full plenary trial on the merits. Clearly the Circuit Court in such a lawsuit is a court which proceeds according to the course of the common law within the meaning of **Rice**. See generally **Curtis**, 415 U.S. at 195 ("When Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts [as opposed to an administrative process or specialized court of equity] a jury trial must be available").[3]

[3]There is an additional reason why jury trials are not available when Circuit Courts review administrative agency decisions. Article V Section 18 of the Missouri Constitution provides that such

judicial review shall be "as provided by law." Pursuant to this provision, the General Assembly has provided that judicial review shall be without a jury. See Section 536.140, R.S.Mo. 2000; **Lasky**, 622 S.W.2d at 763. In other words, the Missouri Constitution itself authorizes the legislature to deny the right to trial by jury in cases brought in Circuit Court to review the decisions of administrative agencies. In contrast, the Missouri Constitution does not authorize the legislature to deny the right to trial by jury in cases brought in Circuit Court under the private remedy provisions of the MHRA.

2. Nature of the Remedy Sought

This Court has often held that where the only relief sought by the plaintiff is the collection of money damages the action is ordinarily one at law rather than at equity. See, e.g., **Willman,** 574 S.W.2d at 422; **Jaycox v. Brune**, 434 S.W.2d 539, 542 (Mo. 1968); **Meadowbrook Country Club v. Davis**, 421 S.W.2d 769, 772 (Mo. banc 1967); **Briggs**, 20 S.W. at 33. Ms. Diehl is not seeking any equitable relief, such as an injunction mandating her reinstatement, which might trigger application of the equitable clean-up doctrine and deprive her of a jury trial on her claims for legal relief. **Wayside Waifs,** 3 S.W.3d at 394. Instead, she seeks a simple money judgment for damages only. In particular, she seeks monetary relief authorized by Section 213.111.2 of the MHRA, namely back pay, emotional distress damages, punitive damages and attorneys' fees. Each of these is a legal not an equitable remedy under well-established authority.[4]

[4] At least one commentator has concluded that the equitable clean-up doctrine violates the right to trial by jury in the Missouri Constitution. O'Neil, Law or Equity: The Right to Trial by Jury in a Civil

Action, 35 Mo. L. Rev. 43, 58, 69 (1970). Certainly it chills the willingness of victims of discrimination such as Ms. Diehl to seek and obtain equitable remedies for the wrongs done to them. Whether Missouri should continue to adhere to the clean-up doctrine, an archaic relic of the common law which has been rejected by the federal courts and the majority of other states, is an issue which ought to examined in this or some future case. Watkins, The Right to Trial by Jury in Arkansas After Merger of Law and Equity, 24 U. Ark. Little Rock L. Rev. 649, 688-89 (2002).

That emotional distress damages and punitive damages are forms of legal relief traditionally awarded in the courts of law is not open to reasonable dispute. See, e.g., **Curtis**, 415 U.S. at 196; **Gallagher**, 962 F.2d at 124. Nor is there any doubt that attorneys' fees are legal relief, see **Briggs**, 20 S.W. at 33, although they can be awarded by a judge rather than a jury because they involve a question of law rather than fact. **State ex rel. Chase Resorts v. Campbell**, 913 S.W.2d 832, 836 (Mo. App. 1995). As regards back pay, the Southern District in **Tolbert** ruled, without any analysis or discussion, that it is an equitable remedy under the MHRA. 828 S.W.2d at 934. In reality, however, it is a legal remedy for two reasons.

First, Missouri courts have long treated recovery of lost wages as a species of legal relief which must be submitted to a jury at least where, as here, the plaintiff does not seek and obtain the equitable remedy of reinstatement. See, e.g., **State v. Kansas City**, 263 S.W. 516, 518-519 (Mo. App. 1924); **Sampson v. Missouri Pacific R. Co.**, 560 S.W.2d 573, 587-589 (Mo. banc 1978).

Second, the text of the remedy provision of the MHRA shows that the Missouri General Assembly viewed back pay as a legal remedy. Victims of discrimination are authorized to recover "actual and punitive damages" from culpable employers. See Section 213.111.2, R.S.Mo. 2000. Actual damages, of course, includes back pay. **Southwestern Bell Telephone Co. v. Buie**, 758 S.W.2d 157, 164 (Mo. App. 1988). Significantly, the term "actual damages," as the Court in **Tolbert** acknowledged, connotes legal relief. **Tolbert**, 828 S.W.2d at 934; **Curtis**, 415 U.S. at 196. Indeed, actual damages includes emotional distress damages which is a quintessential legal remedy. **H.S.**, 967 S.W.2d at 673; **Pollock**, 11 S.W.3d at 769. In short, the General Assembly treated back pay under the MHRA as one component of the legal relief that can be awarded under the statute.

This stands in sharp contrast to the way Congress treated back pay under the pre-1991 version of Title VII of the Civil Rights Act of 1964. There, victims of discrimination were authorized to obtain "reinstatement or hiring. . . with or without back pay. . . or any other equitable relief." 42 U.S.C. §2000e-5(g)(1). As the U.S. Supreme Court has recently explained, courts viewed back pay under the old version of Title VII as equitable in nature because Congress made it "an integral part of an equitable remedy." **Great-West Life & Annuity Ins. Co. v. Knudson**, 122 S.Ct. 708, 717 n. 4 (2002). Here, the exact opposite is true. The General Assembly has made back pay under the MHRA an integral part of a legal remedy and, as such, it must be submitted to a jury. See generally **Meyers v. Chapman Printing,** 840 S.W. 2d 814, 819 (Ky. 1992).[5]

[5]Federal courts have routinely recognized a constitutional right to a jury trial in actions for back pay under statutes that, like the MHRA, authorize legal remedies because back pay is in the nature of compensatory damages. See, e.g., **Lorillard v. Pons**, 98 S.Ct. 866, 870-872 (1978) (Age

Discrimination in Employment Act); **Crocker v. Piedmont Aviation**, 49 F.3d 735, 746-749 (D.C. Cir. 1995) (Airline Deregulation Act); **Waldrop v. Southern Servs.**, 24 F.3d 152, 156-159 (11th Cir. 1994) (Rehabilitation Act); **Hill v. Winn-Dixie Stores**, 934 F.2d 1518, 1525-26 (11th Cir. 1991) (Jury System Improvements Act); **Setser v. Novack**, 638 F.2d 1137, 1140-42 (8th Cir. 1981) (42 U.S.C. §1981); **Santiago-Negron v. Castro-Davila**, 865 F.2d 431, 441 (1st Cir. 1989) (42 U.S.C. §1983).

As an alternative ground for its decision, the Court of Appeals in **Tolbert** ruled that all civil lawsuits under the MHRA are equitable in nature because "most" of the items of relief that can be awarded to victims of discrimination under the statute are equitable in nature. 828 S.W.2d at 935. But this Court has squarely held that the relevant question under the Missouri Constitution is not what relief the plaintiff *could* seek and obtain in her lawsuit, but what relief she actually *does* seek and obtain. See, e.g., **Slagle v. Calloway**, 64 S.W.2d 923, 928 (Mo. 1933) (whether a proceeding is at law or in equity is to be determined "from the pleadings"); **Willman**, 574 S.W.2d at 423 (where a plaintiff's claims for equitable relief are dismissed or decided adversely to her, her remaining claims for legal relief must be tried to a jury). This stands to reason, for otherwise intolerable consequences would result. A claim for damages for breach of contract, for example, could not be tried to a jury because the plaintiff "could" have sought and obtained the equitable remedy of restitution. Similarly, a claim of damages for continuing trespass or nuisance could not be tried to a jury because the plaintiff "could" have sought and obtained the equitable remedy of an injunction. Ms. Diehl's MHRA claims in this case are for money damages only and, as a result, must be heard and decided by a jury.[6]

[6] Although the Court in **DeMay** did not explain why it believed that claims for workers' compensation are equitable, it implied they are equitable because they are decided by an administrative agency, a consideration not relevant in the present case. 37 S.W.2d at 648.

Even on its own terms, the Court's reasoning in **Tolbert** was misguided. Its assertion that the "main thrust" of the remedies under the MHRA are equitable rather than legal was unrealistic. 828 S.W.2d at 935. It unduly minimizes the vital importance of actual damages, punitive damages and attorneys' fees in enforcing the remedial and deterrent goals of the statute. Intentional discrimination in the workplace creates wrenching human costs, both economic and emotional. Monetary awards of back pay and emotional distress damages are indispensable in redressing the harms done to victims of discrimination. **Loomis Electronic Protection v. Schaefer,** 549 P.2d 1341, 1343 (Alaska 1976). Likewise, monetary awards of punitive damages and attorneys' fees further the deterrent aims of the statute. Such awards make discrimination an expensive luxury and create powerful incentives for employers to refrain from it; they are effective in preventing unlawful conduct by employers because they hit where it hurts -- in the pocketbook. **King v. General Motors,** 356 N.W.2d 626, 629 (Mich. App. 1984). To suggest that actual damages, punitive damages and attorneys' fees are merely "incidental" to equitable relief under the MHRA, as the Court in **Tolbert** did, is to indulge in a legal fiction, a piece of anti-realism which courts in other states have repeatedly rejected when analyzing their own anti-discrimination laws. See, e.g., **Fud's, Inc.**, 727 A.2d at 697; **Lavelle v. Mass. Com'n**, 688 N.E.2d at 1331, 1335 (Mass. 1997); **Wagher v. Guy's Foods**, 885 P.2d 1197, 1210-11 (Kan. 1994).[7]

[7]Monetary relief, not equitable relief, occupies center stage in most employment discrimination cases. Typically, the plaintiff in a wrongful discharge case seeks re-instatement, back pay, emotional distress damages, punitive damages and attorneys' fees. All these remedies, with the exception of reinstatement, are legal rather than equitable in nature. Moreover, the plaintiff may seek or be forced to accept front pay

Because the cause of action asserted by Plaintiff Diehl is analogous to a legal cause of action which was tried to a jury in 1820, and because the remedies she seeks are purely legal in nature, she is entitled to a jury trial of her claims of unlawful discrimination under the MHRA.

Several policy considerations argue compellingly in favor of this conclusion. One is that juries may be better equipped than judges to fairly and accurately decide job discrimination cases. Twelve jurors can pool their collective recollections and insights during their deliberations in a way that a single judge cannot. They also bring a certain freshness to the task of factfinding that a jaded or case-hardened judge may lack. "Their very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye." **Dalis**, 636 N.E.2d at 214. Furthermore, jurors in job discrimination cases may be more like the witnesses and the parties in terms of their social background, occupation, education, life experiences, race, mores, and outlook than the judge is. "That may make it easier for them to understand, and to determine the credibility of, the witnesses than it is for the judge to do so." Richard Posner, Frontiers of Legal Theory at 352 (Harvard Univ. Press 2001). Jurors may also

---

(future lost wages) as an alternative to reinstatement because of excessive antagonism between the parties or because the position she once held has been filled by someone else. Front pay, which is merely an extension of back pay, is properly considered a legal remedy under the MHRA. Cf. **Sampson**, 560 S.W.2d at 587-589; **McKnight v. General Motors**, 908 F.2d 104, 117 (7th Cir. 1990).

possess a superior understanding of how the workplace actually operates in the real world. "Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting the subtle. . . dynamics of the workplace." **Gallagher v. Delaney**, 139 F.3d 338, 342 (2d Cir. 1998).

Allowing jury trials under the MHRA would have other beneficial consequences as well. It would remove the anomaly that currently allows victims of discrimination to enjoy jury trials under a wide range of federal anti-discrimination statutes such as Title VII, the Age Discrimination in Employment Act, the Rehabilitation Act, and the Fair Housing Act but not under the Missouri Human Rights Act. There is irony in this situation, since the liability provisions of the MHRA are modeled in large part on these federal civil rights laws. Cf., e.g., Section 213.055, R.S.Mo. 2000 with 42 U.S.C. §2000e-2 and 29 U.S.C. §623; see generally **Pollock,** 11 S.W.3d at 769 (remedy provision of the MHRA closely mimes the remedy provision of the Fair Housing Act).

In addition, it would remove the anomaly that currently grants victims of discrimination jury trials on their MHRA claims in federal court but, paradoxically, denies them the same privilege in state court. Although **Tolbert** held that there is no constitutional right to trial by jury under Article I Section 22(a) of the Missouri Constitution in MHRA cases brought in state court, 828 S.W.2d at 932-935, the Eighth Circuit has held that there is a constitutional right to trial by jury under the Seventh Amendment to the U.S. Constitution in MHRA cases brought in federal court. **Gipson v. KAS Snacktime Co.**, 83 F.3d 225, 230-231 (8th Cir. 1996). The dichotomy generates an incentive for victims of discrimination to bring their MHRA claims in federal court instead of state court (the MHRA claims are joined to parallel federal claims under the federal district court's supplemental jurisdiction) with the result that almost all trial and appellate

litigation under the MHRA now takes place in federal court instead of state court.

Such a result has two troubling aspects. First, it means that the Eighth Circuit and lower federal courts -- not the Missouri Supreme Court and lower state courts -- are primarily responsible for interpreting the scope and meaning of the MHRA. This is undesirable, since the MHRA is an important state statute expressing an important state public policy. As such, it should be construed by Missouri courts not by foreign courts. See **AT&T v. Wallemann**, 827 S.W.2d 217, 224 (Mo. App. 1991) ("the guarantee of civil rights that [the MHRA] vouchsafes is a value that society covets. It is a transcendent public interest"); **High Life Sales Co. v. Brown-Forman Corp.**, 823 S.W.2d 493, 499-500 (Mo. banc 1992) ("this Court should not abrogate the responsibility of interpreting this important statute [involving termination of liquor franchises] to the Kentucky courts"). Yet the practical effect of denying victims of discrimination a jury trial in the state courts is to shift responsibility for the development and evolution of the MHRA to the federal courts, even though Missouri courts are better suited for this task and more keenly interested in it. See, e.g., **Keeney v. Hereford Concrete Products,** 911 S.W.2d 622, 624 (Mo. banc 1995) (anti-retaliation provision of the MHRA is construed as being broader, and imposing greater liability on wrongdoers, than the comparable provision of Title VII).

Second, litigation of MHRA cases in federal district courts instead of county Circuit Courts entails a significant loss of local community control over civil rights controversies. In state court, such cases would be heard and decided by jurors who reside in the same community with the plaintiff and the defendant -- by those citizens, that is, who have the strongest civic interest in the events giving rise to the litigation. In federal court, by contrast, the jurors are drawn from a wide geographical region that encompasses many different counties. There, MHRA cases are decided by people from communities which have little or no

connection to the litigation. Again this is undesirable, since Missouri courts have emphasized that "there is a local interest in having localized controversies decided at home" and that "jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." **State, Kansas City Southern Ry. Co. v. Mauer**, 998 S.W.2d 185, 189 (Mo. App. 1999).

In sum, recognizing a right to trial by jury under the MHRA is justified on sound practical as well as legal grounds. It will enhance the quality of factfinding in civil rights cases, ensure evenhanded treatment of victims of discrimination under the law, allow Missouri courts to retain control over the interpretation and evolution of the MHRA, and guarantee participation by local communities in matters of substantial ongoing concern to them.

CONCLUSION

Missouri courts have traditionally accorded the constitutional right to trial by jury a generous and robust conception. There is an "extremely strong public policy" in favor of the right and "hardly any right is more firmly rooted in our law." **Attebery v. Attebery**, 507 S.W.2d 87, 93 (Mo. App. 1974). Because Respondent's Order denying Plaintiff Diehl a jury trial in her civil action for damages under the MHRA breaks faith with this tradition, and cannot be reconciled with the requirements of the Missouri Constitution, it should be reversed and set aside. Ms. Diehl should be allowed her day in court before a jury on her claims against Defendant.

By: _____
John D. Lynn, #30064
Attorney for Amicus Curiae St. Louis Chapter of the National Employment Lawyers Association

393 N. Euclid, Suite 220
St. Louis, MO 63108
314/367-5575
314/454-1911 (Fax)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing brief and one copy of the brief on disk were was mailed first class postage prepaid to each attorney of record in this lawsuit this ____ day of October, 2002.

_____

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

The undersigned hereby certifies that this brief complies with the word limitation set forth in Rule 84.06(b)(1). The relevant portion of the brief, as defined in Rule 84.06(b), contains 5,687 words. The diskette filed with the Court has been scanned for viruses and is virus-free.

_____